83-53

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

CHARLES SCHAAF,

Respondent,

v

CHESAPEAKE & OHIO RAILWAY CO.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT AND THE MICHIGAN COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

WHETHER, IN A CASE OF FIRST IMPRESSION IN THE STATE, THE MICHIGAN SUPREME COURT ERRED IN FAILING TO CORRECT A MICHIGAN COURT OF APPEALS' DECISION WHICH MISCONSTRUED SECTION 2 OF THE FEDERAL SAFETY APPLIANCES ACT, 45 USC 1, *ET SEQ*, IN HOLDING THAT THE JURY SHOULD NOT BE INSTRUCTED IN A MANNER CONSISTENT WITH ESTABLISHED FEDERAL CASE LAW THAT BEFORE THEY FIND A VIOLATION OF THE SAFETY APPLIANCES ACT FOR THE MERE FAILURE OF CARS EQUIPPED WITH NON-DEFECTIVE DRAW BARS AND COUPLERS TO COUPLE AUTOMATICALLY ON IMPACT, THEY MUST FIND THE FAILURE TO COUPLE ON IMPACT OCCURRED AFTER THE COUPLER HAD BEEN PROPERLY SET AND ALIGNED FOR COUPLING?

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT AND THE MICHIGAN COURT OF APPEALS

Chesapeake & Ohio Railway Co., petitioner, respectfully prays that a Writ of Certiorari issue to the Michigan Supreme Court to review the order entered in this cause January 21, 1983, and the opinion of the Michigan Court of Appeals dated February 19, 1982.

OPINIONS BELOW

Charles Schaaf v *The Chesapeake & Ohio R Co*, Michigan Court of Appeals, No. 52284, Opinion of February 19, 1982, vacating the April 11, 1980, jury verdict no causing plaintiff and remanding the cause for a new trial. Reported, 113 Mich App 544; 317 NW2d 679 (1982). (see Appendix A)

Charles Schaaf v *The Chesapeake & Ohio R Co*, Michigan Supreme Court, No. 68981, Order Denying Defendant's Application for Leave to Appeal because the Court is not persuaded that the question presented should now be reviewed by this Court issued January 21, 1983. (see Appendix B)

Charles Schaaf v *The Chesapeake & Ohio R Co*, Michigan Supreme Court, No. 68981, Order Denying Defendant's Motion for Reconsideration of its Order of January 21, 1983, because it does not appear that said Order was entered erroneously, issued April 20, 1983. (see Appendix C)

JURISDICTION

This case is brought to the United States Supreme Court following an order of the Michigan Supreme Court, dated January 21, 1983, denying the defendant's application for leave to appeal.

The Michigan Supreme Court denied defendant's motion for rehearing of the application for leave to appeal by order dated April 20, 1983.

Said order left standing the decision of the Michigan Court of Appeals dated February 19, 1982, that the trial judge erroneously instructed the jury that draw bars on railroad cars must be properly aligned before a violation of section 2 of the Safety Appliances Act, 45 USC 1, *et seq*, could occur through failure of the railroad cars to automatically couple upon impact.

The jurisdiction of this Honorable Court is invoked pursuant to 28 USC 1257(1), and United States Supreme Court Rule 19(1)(b)(c).

This case came to the Genesee County Circuit Court, Flint, Michigan, pursuant to 45 USC 2 and 45 USC 51.

STATUTES INVOLVED

45 USC 2:

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 USC 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or

closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Plaintiff, Charles Schaaf, was a yard conductor at the Chesapeake & Ohio Railway Company's McGrew Yard in Flint, Michigan.

Among his responsibilities was the coupling and uncoupling of railroad cars.

On October 25, 1976, Mr. Schaaf was working with a crew which was ordered to couple an engine and two cabooses to another series of cars. Accordingly, Mr. Schaaf pulled the lever to open the knuckle and signaled the engineer to "couple" the cars.

The engine and cabooses were slowly backed into the Atchison, Topeka & Santa Fe Railroad Company tri-level freight car. From a safe position at the side of the cars, Mr. Schaaf could see that the knuckle on the Santa Fe car was open. However, the two cars did not couple. He then noted that the draw bar on the Santa Fe car was not properly aligned for coupling.

After signaling his crew to pull the engine and cabooses away from the Santa Fe car, Mr. Schaaf went between the two cars and moved the draw bar on the Santa Fe car into alignment. As he strained, he felt a snap in his back and began to experience pain.

After the draw bar had been adjusted, Mr. Schaaf again signaled the engineer to couple the cars and a successful coupling was made. Neither the coupler, nor the draw bar, were defective.

In October of 1978, a cause of action was instituted on behalf of Mr. Schaaf in the Genesee County Circuit Court against the Chesapeake & Ohio Railroad Company for the injuries he sustained. The case was tried to a jury. Pertinent to this petition, Mr. Schaaf claimed that his injuries were a result of the Chesapeake & Ohio Railroad Company's violation of the automatic coupling provision of the Safety Appliances Act. 45 USCA 2.

Following the presentation of proofs, extensive argument was had regarding the proper instruction to be given under the Safety Appliances Act.

Plaintiff argued that the failure of the railroad cars to couple was a *per se* violation of 42 USCA 2. He requested the court give the following instruction in reliance on *McGowan* v *Denver & Rio Grande W R Co*, 121 Utah 587; 244 P2d 628; *cert den*, 344 US 918; 17 S Ct 346; 97 L Ed 707 (1952).

> "If you should find that the plaintiff, in the performance of his duties, gave the coupler a fair trial in conformity with the intended manner of operation, and the coupler, when so operated, failed to work efficiently, and it became necessary to go between the cars to operate same, then you must find that the railroad violated the Act aforementioned."
>
> "The Safety Appliances Act requires couplers which will couple automatically by impact without the necessity of men going between the cars and the fact that some lateral motion in the coupler mechanism is necessary and the operation of defendant's trains does not relieve the defendant from the requirements to said Act."

Defendant requested an instruction fashioned after that given in *Cobb* v *Union R Co*, 318 F2d 33 (CA 6); *cert den*, 357 US 945; 84 S Ct 352; 11 L Ed 2d 275 (1963).

The trial judge, over plaintiff's objections, gave the following instruction:

> "To comply with the law just stated, a coupler must be one which operated in the manner intended performs its function in all of the ordinary conditions under which couplings or uncouplings are made, second, the duty of the defendant was to equip the car in question with a coupler which when operated in the manner intended would work efficiently by raising the coupling level. If you should find — this is three — if you should find the plaintiff in the performance of his duties aligned the draw bar and the knuckle or knuckles were in the proper position for coupling and that the coupler failed to function properly thereafter, then you must find a violation of the Federal Safety Appliances Act.
>
> The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliances Act, unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling and the cars were handled in the proper manner for impact coupling.
>
> I am going to read that again to you. The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliances Act unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling, and that the cars were handled in the proper manner for impact coupling."

A jury verdict of no cause of action in favor of the Chesapeake & Ohio Railroad Company was returned, and judgment was entered accordingly on April 17, 1980. A motion on behalf of plaintiff for a new trial was denied on June 4, 1980.

Claim of Appeal to the Michigan Court of Appeals was filed by plaintiff on June 24, 1980. The issue raised was:

> "Did the trial court err in instructing the jury that the draw bar must be properly aligned before they could find a violation of Section 2 of the Federal Safety Appliances Act, 45 USC 2, for failure of the cars to couple automatically upon impact?"

On February 19, 1982, the Michigan Court of Appeals issued a per curiam opinion vacating the April 11, 1980, jury verdict of no cause of action and remanded the case back to the circuit court for a new trial.

The court opined that although no Michigan appellate court had yet addressed itself to the issue on appeal, every other appellate court presented with the question had ruled that a misaligned draw bar is in and of itself sufficient to constitute a violation of the Safety Appliances Act.

On March 9, 1982, defendant, Chesapeake & Ohio Railroad Company, made application for leave to appeal to the Michigan Supreme Court. The identical issue was raised. Leave was denied by order dated January 21, 1983, on the grounds that the court was not persuaded that the question presented should now be reviewed. (Appendix B)

On February 4, 1983, defendant made a motion for reconsideration of leave to appeal in the Michigan

Supreme Court. The motion for reconsideration of the court's order of January 21, 1983, was denied. (Appendix C)

From said decisions, defendant brings this petition for writ of certiorari in the United States Supreme Court.

ARGUMENT

Petitioner, Chesapeake & Ohio Railway Company, asks that this Honorable Court issue its Writ of Certiorari in this case for the reason that the Michigan Supreme Court, by denial of application for leave to appeal and denial of motion for reconsideration, let stand a decision of the Michigan Court of Appeals which Petitioner submits is in conflict with the Sixth Circuit's holding in *Cobb* v *Union R Co, supra*.

Additionally, it is submitted that the opinion of the court of appeals, if allowed to stand by the denial of the application for leave to appeal to the Michigan Supreme Court, as well as its denial of the motion for reconsideration, has decided a federal question in a way which is in conflict with this court's decision in *Affolder* v *New York, C & St L R Co*, 339 US 96; 70 S Ct 509; 94 L Ed 683 (1950), which holds that a railroad has a good defense in an action brought under the Safety Appliances Act if the failure to couple upon impact is due to the fact that the coupler was not placed in a position to operate on impact.

Accordingly, it is the Michigan Court of Appeals per curiam opinion of February 19, 1982, which forms the basis of this petition for writ of certiorari.

The only issue which was before the court of appeals was whether or not the trial judge erred in instructing the jury that the railroad car draw bars had to be aligned

before a violation of the Safety Appliances Act could occur through failure of the railroad cars to automatically couple upon impact.

In reviewing the case, the court of appeals acknowledged that railroad cars will not couple unless draw bars are properly aligned and at least one knuckle on the end of the draw bar is open. However, the court ruled that:

> "Although no Michigan appellate court has yet addressed this issue, every other appellate court presented with this question has ruled that a misaligned draw bar is in itself enough to constitute a violation of the Safety Appliances Act." (Appendix A)

The court cites as authority *Kansas City Southern R Co* v *Cagle*, 229 F2d 12 (CA 10, 1955); *Metcalf* v *Atchison, Topeka & Santa Fe R Co*, 491 F2d 892 (CA 10, 1974); *Hallenda* v *Great Northern R Co*, 244 Minn 81; 69 NW2d 673 (1955); and *Donnelly* v *Pennsylvania R Co*, 342 Ill App 566; 97 NE2d 846 (1951).

No mention was made of either *McGowan* v *Denver & Rio Grande W R Co*, *supra*, or *Cobb*, *supra*, in spite of the fact that these cases were cited as authority for the disputed instructions.

It distinguishes the *Affolder* case on the facts ruling that *Affolder* is strictly a coupler case, not a draw bar case, and since "a draw bar . . . can only be aligned manually by someone pushing it while standing between railroad cars", absolute liability is imposed.

Petitioner asserts that the Michigan Court of Appeals' decision in this case is in conflict, not only with this court's opinion in *Affolder* v *New York, C & St L R Co*, *supra*, but is also in conflict with the Sixth Circuit Court of Appeals in *Cobb* v *Union R Co*, *supra*, and is erroneous.

Decisions of the United States Supreme Court concerning the construction and the application of a federal statute are precedent-binding, not only on the lower federal courts, but also on the state courts, including the highest court in the state. *Chesapeake & Ohio R Co* v *Martin*, 283 US 209; 51 S Ct 453; 75 L Ed 983 (1931).

The interpretation of words used in a federal statute is a federal question which is not to be determined by local law unless the federal statute is construed to intend the meaning of a particular word which depends on applicable state law. *Lembcke* v *United States*, 181 F2d 703 (CA 2, 1950).

It is also in contravention of our own Michigan Supreme Court's mandate that a state court is bound by the authoritative holdings of federal courts upon federal questions. Only in the event that there is no Supreme Court interpretation of a statute in question is the court allowed to choose between federal courts of appeals which may be in disagreement and, in that event, preference may be shown for the holding of the circuit most familiar with the law of the form of state. *Schueler* v *Weintrob*, 360 Mich 621; 105 NW2d 42 (1960).

The net result is:

> The statute is construed to include violations for an act which a statute was not intended to include;
>
> The statute is extended to provide a remedy for a violation not envisioned by the draftors without providing the defendant a legal defense as the Supreme Court did in *Affolder* v *New York, C & St L R Co, supra*;

> The court refused to recognize the evidentiary facts that there was no defect or actual failure of the coupler to perform properly when 'set' to couple.

There is no dispute that section 2 of the Federal Safety Appliances Act imposes absolute liability upon the railroad in the event that any car moving in interstate commerce is not equipped with couplers which couple automatically by impact, and which may be uncoupled without the necessity of men going between the cars.

This section of the Safety Appliances Act was enacted in 1893. Subsequently, the statute was construed by the United States Supreme Court in several different decisions in which it made it plain that the evils against which the provisions of this statute were directed to were those attendant to the old fashioned link and pin or similar couplings where it was necessary for men to go between the cars to couple and uncouple them, and where the coupled cars sometimes separated by reasons of the insecurity of the couplings. *Johnson* v *Southern Pacific Co*, 117 F 462 (CA 8, 1902); *rev'd*, 191 US 1; 25 S Ct 158, 49 L Ed 363 (1904).

It is interesting to note, in view of the facts of this case, that at the time the Safety Appliances Act, sections 1-16, was enacted, a provision was also enacted dealing with the height of draw bars. This Honorable Court said of the two provisions, that is, of the one dealing with automatic couplers and the one dealing with the height of the draw bars, that:

> "Where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to the standard." *St Louis R Co* v *Conarty*, 238 US 243; 35 S Ct 785; 59 L Ed 1290 (1915).

The standard dealing with draw bars states:

> "No freight cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the prescribed standards as to height of draw bars." 45 USC 5.

This court's attention is directed to the draw bar statute for the purpose of showing that concerns relating to the use and safety of draw bars were considered by Congress in 1893, at the time that the coupling statute was enacted. Further, this particular section of the Safety Appliances Act does not deal with the horizontal movement of draw bars, nor does any other section of the Act, although there can be no question that the realignment of draw bars was, and continues to be, among the duties of switchmen, brakemen and conductors.

We believe the Act is intended to safeguard employees by requiring railroads to use couplers which do not require them to go between the cars while the cars are in motion. The Act is not directed to static conditions.

The Michigan Court of Appeals would adopt the rule in *Metcalfe*, that a failure of the cars to couple automatically because of a misaligned draw bar is sufficient to state a finding that section 2 has been violated. *Metcalfe*, however, is not the leading authority for the issue raised in this appeal. The principal issue in *Metcalfe* was the sufficiency of the evidence to support a finding of whether or not the violation was the cause in whole or in part of the death of Metcalfe.

The testimony was that Metcalfe stepped between the cars and opened the knuckle on the boxcar. Testimony of a fellow worker revealed that "he dropped straight out of sight." *Ibid* at 895. The worker found Metcalfe pinned beneath the southeast wheels of the boxcar.

In addition, it was plaintiff's position that the necessity of realigning a draw bar in order to couple the cars — after the accident — justified a conclusion that the draw bar was out of line, thus a violation of section 2 of the Safety Appliances Act.

What the *Metcalfe* court did, in essence, was to take away the *Affolder* defense from the railroad by focusing on the draw bar instead of the couplers. It was clear from the testimony that there was a defense since the couplers were not "set" to couple, testimony having shown that Metcalfe stepped between the cars to operate a knuckle on a boxcar.

This posture ignores the very statement of the *Metcalfe* court itself that:

> "In some cases, the draw bar may move so far off-center as to preclude automatic coupling. In such cases, it is necessary to go between the cars to adjust the draw bars." *Id* at 896.

If the *Metcalfe* court really believed that in order to effect automatic coupling misaligned draw bars must be adjusted before an attempt is made at coupling, it is incredible that they believe that there is a violation of section 2 of the Safety Appliances Act when an attempt at coupling is made unsuccessfully with a misaligned draw bar without providing the railroad the right to have the jury instructed that the burden of proof is upon the plaintiff to show that the couplers were properly set before there could be a violation for failure to automatically couple upon impact.

The jury must be allowed to take into consideration that if the draw bars are not aligned and the couplers are not opened, a failure to couple automatically does not impose absolute liability under section 2 of the Safety Appliances Act. For these reasons, we do not believe the *Metcalfe* case is good law.

The *Cobb* case, which came out of the Sixth Circuit Court of Appeals, and the *Affolder* case, which came out of this court, are cases which clearly define the type of instruction which should be given in section 2, Safety Appliances Act cases.

The failure to follow the directives given in these cases is reversible error.

The statements of the applicable law contained in *Cobb* are:

> . . . If the couplers failed to couple automatically upon impact the jury could infer from the fact, but they were not required to infer, that the failure was under circumstances constituting a violation of the Act. (p. 37)
>
> It is the plaintiff's responsibility to carry the burden of proof by the preponderance of the evidence that the injuries were proximately caused by the defendant's violation of the Safety Appliances Act before there can be recovery. (p. 37)
>
> It was the duty of the switchman to signal the engineer that the couplers were properly set before coupling. (p. 36)
>
> [T]he district judge properly told the jury that they could not find a violation of the act is the couplers failed to automatically couple if they were not properly set, but if they failed for any other reason, there would be a violation. (p. 37)
>
> . . . [I]f couplers fail to couple automatically because they are not properly set for coupling under the circumstances, this failure of the cars to couple is not a violation of the Safety Appliances Act, but if they fail to couple automatically by

> impact for any other reason, then this would be a violation of the Safety Appliances Act. (p. 36)
>
> The District Judge told the jury in another part of his charge that if they found that the couplers failed to couple automatically because they were not properly set that such failure would not be a violation of the Act. This was an accurate statement of law and covered defendant's point made in Request No. 3. (p. 36)

The same distinction can be made between this case and *Hallenda* v *Great Northern R Co, supra*, and *Metcalfe* v *Atchison, Topeka & Santa Fe R Co, supra*. In each of these cases, the plaintiffs were injured on impact of the cars. In *Hallenda*, Plaintiff was standing on a flat car when he heard the sound of approaching cars. He grabbed the brake wheel so as to brace himself, but was thrown from the car. An examination after the accident revealed that the knuckles on the ends of both of the cars were open before the impact. Thus, the cars should have coupled, unless the couplers were defective, and the jury was warranted in finding a violation of the Safety Appliances Act.

In *Metcalfe, supra*, the plaintiff was killed when his body was pinned beneath the wheels of a boxcar, evidencing movement at the time of the injury.

In this case, Schaaf was injured in the process of setting the moveable draw bar between the car frame and the coupler so that when he finished, the couplers would be in a position to impact and couple when he signaled the engineer to back up the train.

After Schaaf had set the coupler knuckle and aligned the draw bar, he moved to a safe position. The couplers coupled automatically upon impact.

Schaaf was not injured as a result of any defective equipment, or as a result of an impact which occurred in an unsuccessful effort to couple the cars. There was no movement of the train or the tri-level car at the time of the alleged injury.

The holding in *Finley* v *Southern Pacific R Co*, 179 Cal App 2d 424; 3 Cal Rep 895 (1960), also states the applicable law.

In that case, Finley, a switchman, was seated on top of a boxcar and was injured during the second impact of cars which failed to couple.

The evidence showed that the coupler was open on the car which was to couple with the first series of cars in the cut.

The appellate court's discussion of the jury instructions included a "fair trial" test to determine if there had been a violation of section 2 of the Safety Appliances Act. The court said:

> Was there a fair trial, that is; was there an honest effort to attempt a coupling by impact, was it attempted in the ordinary, reasonable, customary manner; that if there was not a fair test given and the coupling failed to operate, there was no violation of the act — if there was a fair trial and the coupler did not operate at the time and place of the accident and its failure proximately caused the injuries in question, a violation of the act occurred; and that liability for failure to comply is absolute and not dependent upon lack of reasonable care — the violation is itself negligence. The propriety of none of these instructions has been questioned. *Id* at 897.

The authorities applicable to this case are the holdings in *Affolder*, *Cobb*, and *Finley*. These are the three cases which specifically review instructions given in cases involving violations of section 2 of the Safety Appliances Act.

The Michigan Court of Appeals, in its opinion, evidences that it chose to completely disregard the *Cobb* case notwithstanding that *Cobb* is cited as authority for the instruction which was given by the trial court.

The only instruction case that it discusses is *Affolder*, and it distinguishes this case on the coupler versus the misaligned draw-bar theory.

CONCLUSION

The opinion of the Michigan Court of Appeals, allowed to stand by the denial of the application for leave to appeal by the Michigan Supreme Court, and its denial for motion for reconsideration, has decided a federal question in a way which is in conflict with this Court's holding in *Affolder* v *New York, C & St L R Co, supra*. Additionally, it is in conflict with the Sixth Circuit's holding in *Cobb* v *Union R Co, supra*.

Both of these opinions are directly on point in that they instruct the trial court specifically on the kind of instructions which should be given in a case involving a violation of section 2 of the Safety Appliances Act.

Any attempt to distinguish these cases on the facts so as to avoid giving the defendant the benefit of the *Affolder* defense is in direct contravention of the holding of this Court.

RELIEF REQUESTED

For the reasons above set forth, Petitioner respectfully prays this Court issue its Writ of Certiorari in this case to the Michigan Supreme Court and the Michigan Court of Appeals and stay the proceedings in the Genesee County Circuit Court, Flint, Michigan.

Respectfully submitted,

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Dated: July 7, 1983

APPENDIX A

OPINION

(State of Michigan — Court of Appeals)

(Released February 19, 1982)

(Charles Schaaf, Plaintiff-Appellant, v Chesapeake & Ohio Railway Company, Defendant-Appellee — No. 52284)

Before: Bronson, P. J., T. M. Burns and Corden, JJ.

Per Curiam

Plaintiff appeals as of right an April 11, 1980, jury verdict no causing him in this action, brough (sic) under the Federal Employers' Liability Act, 45 USCA 51, and the Federal Safety Appliances Act, 45 USCA 2. We reverse.

Plaintiff was employed as a yard conductor for the defendant railway company. This position required him to couple and uncouple box cars. On October 25, 1976, plaintiff was instructed to couple an engine and two cabooses with another series of railroad cars.

Railroad cars will not couple unless their drawbars are properly aligned and at least one knuckle on the end of a drawbar is open. A drawbar can be adjusted into alignment manually by pushing or pulling on the bar from the end of its railroad car.

On the date in question plaintiff initially was unable to couple the series of railroad cars with the engine and caboose because the drawbars were not aligned. Plaintiff signaled the engineer to pull the engine and cabooses away from the other cars and then went between the cars

and attempted to move one of the drawbars into alignment. He was in the process of shoving on the bar when he felt his back snap and he suffered severe injury.

In October, 1978, plaintiff filed suit. He maintained that the railroad was strictly liable for his injuries because it had violated the automatic coupling provisions of the Safety Appliances Act, 45 USCA 2. That act provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Plaintiff argued at trial that the failure of the railroad cars to couple upon impact was a per se violation of the Safety Appliances Act and that the jury should be so instructed. Defendant countered that the jury should be instructed that no violation of this act could be found unless both drawbars were properly aligned before the attempt at coupling took place. After listening to extensive argument by the parties, the trial judge adopted defendant's argument and instructed the jury accordingly:

> "Now, let's talk about what the real duty is with respect to the railroad and automatic couplers, and I ask you to pay particular attention to this:
>
> "To comply with the law just stated, a coupler must be one which operated in the manner intended, performs its function in all the ordinary conditions under which couplings or uncouplings

are made, second, the duty of the defendant was to equip the car in question with a coupler which when operated in the manner intended would work efficiently by raising the coupling lever. If you should find — this is 3 — if you should find the plaintiff in the performance of his duties aligned the draw bar and the knuckle or knuckles were in the proper position for coupling and that the coupler failed to function properly thereafter, then you must find a violation of the Federal Appliance Safety Act.

"The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliance Act, unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling and the cars were handled in the proper manner for impact coupling.

"I'm going to read that again to you. The mere failure of cars to couple automatically on impact is not sufficient to constitute a violation of the Safety Appliance Act unless you find that such failure, if any, occurred after the coupler had been properly set and aligned for coupling and that the cars were handled in the proper manner for impact coupling."

The jury returned a verdict in favor of defendant. Plaintiff's motion for a new trial was denied and now plaintiff appeals.

The single issue raised in this appeal was whether the trial judge erred in instructing the jury that the railroad car drawbars had to be aligned before a violation of the Safety Appliances Act could occur through failure of the railroad cars to automatically couple upon impact.

Although no Michigan appellate court has yet addressed this issue, every other appellate court presented with this question has ruled that a misaligned drawbar is in itself enough to constitute a violation of the Safety Appliances Act. In *Kansas City Southern RR Co* v *Cagle*, 229 F2d 12, 14 (CA 10, 1955), the Federal Court of Appeals addressed a factual situation substantially similar to that at bar. There, an out-of-alignment drawbar was in such a condition that it would not automatically couple to railroad cars upon impact. As a result, it was necessary for an employee to manually align the drawbar so that the coupling could be made. While doing so, an employee was injured. The Federal Court of Appeals held:

> "Without exception the cases have held that operating a car on which the drawbar is so far out of alignment as to prevent automatic coupling violates the [Safety Appliances] act and imposes absolute liability."

See also *Metcalfe* v *Atchison, Topeka and Santa Fe RR Co*, 491 F2d 892, 896-897 (CA 10, 1974) (citing cases), *Hallenda* v *Great Northern RR*, 244 Minn 81; 69 NW2d 673, 681 (1955) (holding that it is no defense in an action brought under the Safety Appliances Act that if the failure of drawbars to couple upon impact was caused by misalignment), *Donnelly* v *Pennsylvania RR Co*, 342 Ill App 556; 97 NE2d 846 (1951).

We find these cases to be persuasive. Defendant fails to cite, and our research has not discovered, any case holding that drawbars must be properly aligned before a railroad can be found guilty of a violation of the Safety Appliances Act. The case of *Affolder* v *New York, Chicago and St. Louis RR Co*, 339 US 96; 70 S Ct 509; 94 L Ed 683 (1950), is distinguishable because that case involved the failure of two cars to couple on impact because a coupler

had not been properly opened. There is a crucial distinction between a coupler and a drawbar. A coupler can be opened and closed without the necessity of having someone go between any railroad cars. A drawbar, however, can only be aligned manually by someone pushing it while standing between railroad cars. Therefore, the trial judge's instructions to the jury were in error. The April 11, 1980, jury verdict no causing plaintiff is vacated and this cause is remanded for a new trial.

Reversed and remanded.

APPENDIX B

ORDER

(State of Michigan — Supreme Court)

(Entered January 21, 1983)

(Charles Schaaf, Plaintiff-Appellee, v Chesapeake & Ohio Railway Co., Defendant-Appellant — SC: 68981; COA: 52284; LC: 78-49979-NO)

Present the Honorable: G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, Dorothy Comstock Riley, James H. Brickley, Michael F. Cavanagh, Associate Justices

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 21st day of January in the year of our Lord one thousand nine hundred and eighty-three.

On order of the Court, the application for leave to appeal is considered, and it is Denied, because the Court is not persuaded that the question presented should now be reviewed by this Court.

(Certification Omitted)

APPENDIX C

ORDER

(State of Michigan — Supreme Court)

(Entered April 20, 1983)

(Charles Schaaf, Plaintiff-Appellee, v Chesapeake & Ohio Railway Co., Defendant-Appellant — SC: 68981; COA: 52284; LC: 78-49979-NO)

Present the Honorable: G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Associate Justices

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 20th day of April in the year of our Lord one thousand nine hundred and eighty-three.

On order of the Court, the motion by defendant-appellant for reconsideration of this Court's order of January 21, 1983, is considered, and the motion is Denied, because it does not appear that said order was entered erroneously.

(*Certification Omitted*)